NO. 83-1202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Question Presented

1. Whether under the totality of the circumstances the Court of Appeals acted properly in amending its previously entered order to exclude from backpay consideration "similarly situated" individuals.

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INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO ("Local 480"), in response to the National Labor Relations Board's ("Board") petition for a writ of certiorari, respectfully shows as follows:

Counter-Statement of the Case

The unfair labor practice complaint in this matter was filed by the Board in February, 1977 on behalf of five identified individuals, i.e., Dietz, Dailey, Cron, Szary and Korab, as well as "all other non-member applicants who were similarly situated." Only the five named individuals, however, appeared and participated at the hearing. The Board's decision ruled that discrimination had been practiced by Local 480 in the operation of its job referral system and, accordingly, a broadly based backpay order was issued. This order required Local 480 to make whole the five charging parties, as well as all other "similarly situated" individuals (P.A.27a). Backpay was to be calculated according to a formula whereby the overall earnings of all applicants, members and nonmembers, seeking employment through its referral system would be divided by the total number of ironworkers who worked out of the hiring hall, taking into account the net earnings of the individual discriminatees during the relevant period and providing for the inclusion of interest (P.A.21a-22a). The court of appeals ordered enforcement of the Board's order on May 11, 1979 (P.A.9a-10a).

During the subsequent three year period, the Board made no appreciable headway in the formulation of a backpay specification. Indeed, the Board had not even identified those individuals which it contended fell within the "similarly situated" category, much less engaged in a computation of the monies owed pursuant to the backpay formula.

It was within the above framework that Local 480 filed its first motion, pursuant to the provisions of Federal Rule 60(b)(6), for partial relief from the terms of the Judgment-Order previously entered against it (R.A.1a-2a). Two additional applications for similar relief were

subsequently filed by Local 480; the third application ultimately resulting in the issuance by the Court of Appeals of the order which is the subject of the Board's instant petition for review. The issuance of this order can only be fully understood, therefore, when viewed within the context of the motions and orders that had immediately preceeded it. Accordingly, a brief discussion of the background of each separate application will herein be set forth:

Modification Motion I—April, 1982—This application sought relief from the backpay provisions relating to "similarly situated" individuals on the grounds that:

> . . . the inability of the Board to even identify similarly situated individuals during the past approximate three year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act (R.A.2a).

This application was supported by the affidavit of Francis E. Arny, Business Manager of Local 480, which affidavit (R.A.3a-7a) raised the following considerations:

1. The Board had confirmed that the Local had long ago ceased its discriminatory activity;

2. The Local was fully prepared to meet its backpay obligations to the five charging parties;

3. The Board, however, would accept no payment on behalf of the five named individuals. The Board's reasoning in this regard was based upon the realization that the inclusion of the "similarly situated" individuals would result in a backpay liability which would exceed the Local's ability to pay. Pro-ration of the awards would, thus, be

necessitated. This could only be accomplished when a backpay amount for each individual had been established;

4. No additional individuals aside from the charging parties had contacted the Board seeking to participate in backpay proceedings since the inception of the litigation.

5. The lack of any delineation as to the extent of the local's still undefined and unspecified liability had effectively precluded it from conducting its business affairs in a proper and normal fashion;

6. The Board was still experiencing tremendous difficulties in formulating a "broadly based" backpay specification; and

7. Prompt resolution of this matter was, therefore, being held up on account of unidentified individuals who had expressed no interest during the intervening years in becoming a participant in the proceedings. Thus, the rights of both the charging parties and Local 480 were being prejudiced by the inclusion of "similarly situated" individuals in the backpay remedy.

After consideration of the affidavits and memoranda of law submitted by the parties, both in support of and in opposition to the granting of the requested relief, the court entered an Order dated May 13, 1982 denying Local 480's motion "without prejudice to review such motion after 90 days if the situation is not clarified by then; the present panel to retain jurisdiction" (P.A.8a).

Modification Motion II—October, 1982—Local 480 received absolutely no communications from the Board regarding the implementation of a backpay specification after the issuance of the court's May 13, 1982 order. Accordingly, after the passage of more than four months, the Local once again renewed its motion for partial relief from judgment (R.A.8a-9a). In support of this applica-

tion, the Local once again relied upon the previously submitted Arny affidavit, as well as the affidavit of its attorney, John J. Mulvihill (R.A.10a-14a). The Mulvihill affidavit was submitted in response to the Board's previously raised contention that the Local was in some way responsible for the Board's failure to formulate the backpay specification. One of the positions taken by the Board in response to the renewed application was that it had never been made aware of the existence of the court's May 13, 1982 order establishing the 90 day clarification period (P.A.92a).

After consideration of the pleadings submitted, and after hearing oral argument, the court issued an amended order dated December 1, 1982 which modified the existing Judgment-Order by placing "a termination date of December 31, 1982 for entering a formal backpay specification in connection with the proceedings to obtain back pay." (P.A.6a).

Modification Motion III—March, 1983—On December 21, 1982 the Board issued a document which purported to be its formal backpay specification (P.A.94a-99a). The specification sought recovery on behalf of 137 individuals of approximately 1.2 million dollars. This figure included backpay, fringe benefit payments and interest. Contrasted with this staggering liability was the relatively minimal backpay amounts alleged by the Board to be due and owing to the five charging parties. The amounts were as follows:

Ronald Cron	$1,952
Robert Dailey	2,413
Daniel Dietz	1,685
Edward Korab	-0-
Walter Serafin	1,656
	$7,706

The specification, itself, was totally deficient in that it failed to comply with either the backpay formula set forth in the Board's Order and Decision in this matter (P.A.21a), or the Board's own rules and regulations governing the issuance of such specifications. Among its deficiencies, the specification failed to contain the following basic information:

(a) the total actual earnings of all local members who were referred out of the Local 480 hiring hall;

(b) the total actual earnings of all non-local members who were referred out of the Local 480 hiring hall;

(c) the average earnings of all ironworkers who were referred out of the Local 480 hiring hall; and

(d) the amount of interim earnings of the alleged discriminatees during the back pay period (P.A.58a-59a).

Instead of the utilization of actual earning figures, the Board substituted the following approach in formulating its specification:

Local 480 members—The average earnings figure for local members was arrived at by picking at random the names of six local members. As to these individuals the Board reviewed the referral registers and counted the days from the time the member was referred to work until he next registered for employment. Based upon an *assumption* that the individual was working during this entire period of time, the Board projected earnings based upon the per diem rate contained in the collective bargaining agreement. An average amount of days worked was, thereafter, calculated and that number was then multiplied by the number of local members, ranging in different years from 120 to 147 members, in order to establish the purported total earnings of Local 480 members (P.A.59a).

Non-Local members—Since no attempt had been made by the Board to contact any of the alleged 132 "similarly situated" individuals, the Board projected earnings by utilizing wage information secured from four of the five charging parties contending that such an approach constituted a "representative sample" of all non-local job applicants. (P.A.96a). Since only two of these individuals shaped the hiring hall during 1978, however, the earnings figures for the alleged 137 discriminatees was based solely upon the average earnings of only two individuals.

It was readily apparent, therefore, that the Board's specification constituted a device designed primarily to circumvent the court imposed deadline, rather than a meaningful attempt to ascertain the amount of the backpay actually owed. Accordingly, Local 480 filed its third motion for modification seeking termination of the backpay proceedings for failure of the Board to comply with the deadline. Alternative relief, however, was also requested. This alternative relief was requested as follows:

> (b) An order modifying the Judgment-Order dated May 11, 1979 to remove from the backpay requirement "all other nonmember applicants who were similarly situated" on the grounds that the Board's backpay specification is unenforceable because punitive in nature and no longer in furtherance of the principles underlying the passage of the National Labor Relations Act (P.A.54a).

Such alternative relief could now be requested because both the Local and the court had, for the first time, been made aware of the fact that the Board was seeking a backpay recovery in excess of one million dollars. Subsequent to the filing of the Local 480 motion, the Board issued an amended backpay specification (P.A.100a) which

attempted to utilize actual earning figures. This amended specification failed to substantially reduce, however, the total recovery sought by the Board.

Prior to the issuance of the court's order (P.A.1a), the parties began settlement negotiations at the suggestion of Judge Adams. (Pet. 11). The Local agreed to a Board audit of its finances in order that the Board might satisfy itself as to the Local's ability to pay. The Board confirmed that the net worth of the Local was substantially less than $100,000 (Pet. 17). The Board, thereupon, informed the court that it would not enter into settlement discussions, apparently taking the position that it would not settle for anything less than 80% of the total amount claimed.

On July 27, 1983 the court issued its order on the Local 480 application. The order stated as follows:

> 1. Any back pay specifications not made by December 31, 1982 are hereby barred and are not to be considered. See order of court dated December 1, 1982 (P.A.1a);
>
> 2. Payment in full by the Union of any claims asserted on behalf of Ronald Cron, Robert Dailey, Daniel Dietz and Walter Serafin shall be considered compliance with paragraph 1 of this order (P.A. 2a).

The Board subsequently filed a petition for rehearing en banc of the court's order. This petition was denied by order dated August 24, 1983 (P.A.3a-4a). Shortly thereafter, Local 480 forwarded to the Board appropriate checks made payable to the charging parties in full compliance with the provisions of the court's amended order.

Reasons for Denying the Petition

It is the Board's primary contention that certification should be granted because the modification order of the Court of Appeals is directly contrary to this Court's decision in *NLRB* v. *J.H. Rutter Rex Manufacturing Co.*, 369 U.S. 258 (1969). In *Rutter Rex,* this Court held that the Court of Appeals had acted improperly in modifying the provisions of a backpay order due to the Board's inordinate delay in issuing its backpay specification. The sole consideration raised by the employer in defense of the Board's application for enforcement was, therefore, "delay". It is respectfully submitted that the instant matter is both factually and legally distinguishable from the *Rutter-Rex* holding.

Initially, it must be recognized that the relief ultimately accorded to Local 480 was the alternative relief requested in its motion, i.e., removal of "similarly situated" individuals from the backpay requirement, rather than the total striking of the specification for failure to meet the court imposed deadline. It should further be understood that the grounds advanced by Local 480 in support of its application for such relief was the unenforceability of the specification due to its punitive nature, not the delay in issuing the specification. The fact that the court of appeals upheld payment to the charging parties in accordance with the December 21, 1982 specification, but struck from the specification all other alleged "similarly situated" individuals, lends credence to this analysis. This is not to say, however, that the delay in issuing the specification and the inherent unworkability of the backpay formula played absolutely no part in the court's ultimate decision. These, as well as other factors, were invariably considered by the court before fashioning the final relief in response to the Local 480 application for modification.

In issuing its order, the Court of Appeals acted properly and in conformity with existing judicial decisions. Courts have long enjoyed the inherent authority to reform final judgments in special situations where strict enforcement could result in extreme hardship, injustice or oppressiveness. *Goland* v. *Central Intelligence Agency,* 607 F2d 339 (D.C.App. 1978), cert. den. 100 S. Ct. 1312 (1980). This common law equitable power was expressly recognized and codified in Rule 60 of the Federal Rules of Civil Procedure which provides as follows in its relevant section:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

The broad language of subdivision (b)(6) establishes, therefore, a residuary of power in the courts to grant relief under circumstances not specifically delineated in the first five clauses of the subdivision. One of the reasons found acceptable by the courts in invoking its modification powers involves the concept of "changed circumstances". Changed circumstances refers to events occurring subsequent to the entrance of an order which make it unfair or oppressive to continue the dictates of the order. In the context of NLRB enforcement orders, the courts have suggested that the appropriate test should be whether subsequent events have demonstrated that enforcement would no longer be in furtherance of the purposes of the Act. *NLRB* v. *Mastro Plastics Corp.,* 261 F2d 147 (2nd Cir. 1958); *NLRB* v. *Fairview Hospital,* 443 F2d 1217 (7th Cir. 1971).

It is well established that a Board order which is confiscatory in nature and not reasonably adapted to the

situation that calls for redress will not be upheld by the courts. *NLRB* v. *Townhouse TV and Appliances, Inc.*, 531 F2d 826 (7th Cir. 1976). Similarly, the Board may not apply a remedy without regard to circumstances which may make its application in a particular situation oppressive. *NLRB* v. *Seven-Up Bottling Co.*, 344 US 344 (1953). This basic principle was enunciated thusly in *Republic Steel Corp.* v. *NLRB*, 311 US 9, 11 (1940):

> We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.

In making a determination as to the enforceability of a Board order, a relevant factor to be considered is the financial impact that imposition of the order will have upon a particular respondent. In *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F2d 60 (2nd Cir. 1979) the employer, a small Vermont company, argued that the drastic economic consequences of an estimated $388,000 affirmative order rendered the order punitive. In adopting the employer's argument, the court reasoned thusly:

> . . . The Board urges that we refuse to consider the financial impact of its order on the company at this stage, leaving questions of cost to any further proceeding dealing with compliance. We do not accept the position that we are so narrowly bound in our review at this point, and we feel that an evaluation of the costs to the company is relevant in reviewing the appropriateness of the Board's order. (68)

A similar approach was adopted in *NLRB* v. *Townhouse TV and Appliance, Inc., supra*, where the court charac-

terized as punitive, and not remedial, an order requiring the employer to resume trucking operations where the "capital outlay to reacquire trucks, estimated at more than $16,000 by counsel at oral argument, plus costs such as insurance, maintenance, fuel and taxes, will entail considerable burdens to this relatively small company . . ." The economic consequences to an employer was also considered in *Frito-Lay, Inc.* v. *NLRB,* 585 F2d 62 (3rd Cir. 1978), where the court indicated it would not enforce a Board order in the following language:

> By ordering reopening of the plant with backpay to the terminated employees, the Board has ignored this limitation. In argument, Frito-Lay estimated that the cost of awarding backpay to the employees would exceed one million dollars.
>
> Further, there was no dispute by the Board that the plant was being run at an economic loss when it was closed in June, 1975. Yet, the Board would have this plant reopened at an estimated operating loss of several hundred thousand dollars to the company a year. (68)

An application of the above principles to the facts of the instant case discloses the correctness of the Court of Appeals modification order excluding from the backpay requirement "similarly situated" individuals. At the time the court issued its enforcement order in May, 1979 the court was unaware of either the number of individuals comprising the class, or the economic impact that the inclusion of the class would have upon respondent. Once the specification issued approximately 3½ years later, the court was made aware of the fact that the Board was seeking to recover a backpay liability of approximately 1.2 million; a gigantic quantum leap from the $7,700 allegedly owed to the five charging parties.

Additionally, it is crucial to note that the "similarly situated" individuals for which the Board seeks to recover over $1 million did not see fit to file an unfair labor charge; were never contacted by the Board regarding their desire to participate in the backpay proceedings; and are, up to the present time, unaware of the Board's unilateral determination that they are entitled to backpay. Any recovery as far as these individuals are concerned would, thus, constitute a "windfall". The effect of the "windfall" payment to these "similarly situated" individuals would be severe; it would totally bankrupt the local. It is urged that such a result is not within the intendment of the Act.

Prior to the present offense, Local 480 had no history of violating the provisions of the Act. In the instant matter, the local's sole violation was that it referred to work a disproportionate number of its members as "stewards". All other referrals, aside from the "steward" referrals, were found by the Board to be in conformity with the provisions of the Act. The Local long ago discontinued its use of the "steward" referral. The policy of the Act to remedy discriminatory practices has, thus, already been achieved. The continued insistence of the Board, under these circumstances, to press for a $1 million payment to "similarly situated" individuals is unduly harsh, excessive, confiscatory and not reasonably adapted to the situation that calls for redress. The Court of Appeals decision to modify its previously entered order by excluding "similarly situated" individuals from backpay consideration is, therefore, proper and correct under the totality of the circumstances presented in this case.

The Court of Appeals was also correct in not permitting an amended specification after the court imposed December 31, 1982 deadline. To allow such an amendment, which in effect constituted a totally new specification, would have

amounted to the court giving its imprimatur to circumvention of its own order. The Court of Appeals has been entrusted with general supervisory responsibilities over Board decisions and orders. It arrived at its decision in this matter pursuant to its duty to assume that the Board keeps within "reasonable bounds". *Universal Camera Corp.* v. *NLRB*, 340 US 474. The Court of Appeals' decision is correct, and not, therefore, properly a subject for this Court's review.

CONCLUSION

For all the reasons expressed above, it is respectfully submitted that the Board's petition for a writ of certiorari be denied.

Respectfully submitted,

THOMAS J. O'NEILL
Attorney for Respondent, Ironworkers Local 480

Dated: March 12, 1984

APPENDIX A

Motion for Partial Relief from Judgment (March 31, 1982)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, International Association of Bridge Structural & Ornamental Ironworkers, AFL-CIO, by its attorneys, Nolan, Bell and Moore, Esqs., moves this Court pursuant to the provisions of Federal Rule 60(b)(6) for partial relief from the terms of final judgment and Order entered against it by this Court dated May 11, 1979. This Judgment Order granted enforcement in its entirety to

an order of the National Labor Relations Board dated May 9, 1978, which included the following back pay provision:

> 2(d) Make whole each of the above-named employees, and all other non-member applicants who were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy".

Respondent requests relief from the "and all other non-member applicants who were similarly situated" portion of this order on the grounds that inability of the Board to even identify "similarly situated" individuals during the past approximate three year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act. In support of its motion, Respondent shall rely upon the Affidavit of Francis E. Arny, attached hereto, as well as the Memorandum of Law submitted herewith.

NOLAN, BELL & MOORE
Attorneys for Respondent
By: JOHN J. MULVIHILL

Dated: March 31, 1982

APPENDIX B

Affidavit of Francis E. Arny in Support of Motion for Modification

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

STATE OF NEW JERSEY,
COUNTY OF UNION, } ss.:

Francis E. Arny, of full age, being duly sworn upon his oath deposes and says:

1. I am presently the Business Manager of Ironworker Local 480 and have held that position since my election in 1972. Prior to that date, I was the Business Agent of the Local since 1968. I have personal knowledge of all the allegations set forth in this affidavit.

Appendix B

2. On May 11, 1979, the Court ordered that the application of the National Labor Relations Board ("Board") for enforcement of its order in the within matter be granted. A copy of the Court's Judgment Order is attached hereto as Exhibit "A". The Board's Order in its relevant part provides as follows:

> 2(d) Make whole each of the above-named employees, *and all other non-member applicants who were similarly situated,* for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of the Decision and Order entitled, "The Remedy". (emphasis added).

3. A total of five individuals were named in the Board's order, i.e., Daniel Dietz, Robert Dailey, Edward Korab, Walter Serafin and Ronald Cron. Upon information or belief, no other individual who shapes the Local 480 hiring hall has contacted the Board seeking to participate in the back pay recovery.

4. Since the issuance of this Court's Order, May 11, 1979, Local 480 has fully cooperated with the Board in its attempts to implement the Order. On October 9, 1980, Mr. Gregory Burke, a Board compliance officer, reviewed the Local's referral registers and advised that he was satisfied that any discriminatory conduct had ceased as of January 1, 1979. He, therefore, saw no necessity in xeroxing the registers from this period forward, but did take five registers for copying and returned them the next day.

5. Since that time, the Local has received no further communication from the Board as to the identity of those

individuals which it considers falling within the ambit of the "similarly situated" language of the Order. Apparently, the Board has experienced tremendous problems in its attempts to identify those individuals which it contends are "similarly situated".

6. The Board's difficulty in this regard is evidenced by the statements contained in its letter to all charging parties dated August 6, 1981. A copy of this letter, with its attachment containing hypothetical questions, is attached hereto as Exhibit "B". This letter makes clear that the Board, as of August, 1981, had not yet identified those individuals which it considers "similarly situated." The following excerpt, in response to hypothetical question No. 1 on the attachment, makes this abundantly clear:

> Since the decision *requires* that we fix backpay for every out-of-towner who was passed over, we now have to analyze every line of every referral register to determine who was passed over and when. This is not easy, for two reasons. First, we must list and document each passover, so we can prove it later at a backpay hearing if we have to. Second, may ironworkers signed their names differently each time they registered, and we have to determine how many of these "different" names are actually the same person, so that everyone gets the full amount due. (Also, on some lines the handwriting is poor, and it takes time to determine whose name it is.)

7. The Board has not, therefore, made even the initial determination as to the identity of those individuals which it contends were discriminated against. Additionally, the Board has yet to attempt to resolved the second step required for the formulation of a backpay specification, i.e.,

the establishment of an average quarterly wage for all ironworkers working out of the Local's hiring hall. It is submitted that this second step is immeasurably more difficult that the simple identification of individuals required under the first step.

8. One of the direct results of the Board's inability to formulate a backpay specification, is the fact that the five charging parties have been precluded from recovering any monies. The Board has taken the position that no monies can be turned over until such time as all discriminatees have been identified and an average earning established. The Board's position is articulated in its August 6, 1981 letter in response to hypothetical question No. 2 as follows:

> We do not have a choice. The Order says to take the total of *everyone* who worked, and to pay backpay to *all* out-of-towners passed over. We cannot change the Order. Also, if the locals do not have enough money to pay everyone, it will be necessary to know how much is due *in total,* so we can determine how to divide up what is available.

9. Another result of the Board's prolonged delay has been to make it difficult, if not impossible, for the Local to conduct its business in a proper and normal fashion. Absent some delineation as to the extent of this undefined and unspecified liability, the Local has effectively been precluded from making any type of long range plans for future activities.

10. The effect of the inclusion of the "similarly situated" category in the Board's order has been, therefore, to frustrate, and not promote, the purposes of the Act. The Board's failure, after the passage of approximately

three years, to even identify "similarly situated" individuals, indicates that the Order, as presently constituted, is totallly unworkable. The difficulty is implementing the Order has worked to the prejudice of the charging parties in favor of individuals yet to be identified who have expressed no interest during the past three years in becoming a party to these proceedings.

11. The only type violation found by the Board in the within proceedings was the use by the Local of the "steward" designation in its referral procedures. Since the decision, the Local has corrected this problem and has ceased the practice of referring "stewards" out of chronological order. The Local would like nothing better, therefore, than to finally conclude this matter by fulfilling its backpay obligations. The goal cannot be achieved, however, as long as the Board persists in its vain attempts to make whole "similarly situated" individuals.

12. It is respectfully submitted, therefore, that events subsequent to this Court's May 11, 1979 Order have proven that the inclusion of the "similarly situated" backpay provision is not only unworkable, but is also not in furtherance of the purposes of the Act. Modification of the Order to delete the "similarly situated" requirement will result in a speedy resolution of the backpay award to the charging parties and would also allow the Local to resume its normal business operations.

FRANCIS E. ARNY

Sworn and subscribed before
me this 20th day of March,
1982.

JOHN J. MULVIHILL
Attorney at Law of New Jersey

APPENDIX C

Motion for Partial Relief from Judgment (September 28, 1982)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, by its attorneys, Nolan, Bell and Moore, Esqs., moves this Court pursuant to the provisions of Federal Rule 60(b)(6) for partial relief from the terms of final judgment and Order entered against it by this Court dated May 11, 1979. This Judgment Order granted enforcement in its entirety to an

order of the National Labor Relations Board dated May 9, 1978, which included the following back pay provision:

> 2(d) Make whole each of the above-named employees, and all other non-member applicants who were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy".

Respondent requests relief from the "and all other non-member applicants who were similarly situated" portion of this order on the grounds that the inability of the Board to even identify "similarly situated" individuals during the past approximate three and one-half year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act. In support of its motion, Respondent shall rely upon the previously submitted Affidavit of Francis E. Arny, dated March 29, 1982, and the Affidavit of John J. Mulvihill, Esq., attached hereto, as well as the Memorandum of Law submitted herewith.

NOLAN, BELL & MOORE
Attorneys for Respondent
By: JOHN J. MULVIHILL

Dated: September 28, 1982

APPENDIX D

Affidavit of John J. Mulvihill, Esq. in Support of Motion for Modification

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

STATE OF NEW JERSEY, }
COUNTY OF OCEAN, } ss.:

John J. Mulvihill, of full age, being duly sworn upon his oath deposes and says:

1. I am an associate with the firm of Nolan, Bell and Moore, Esqs., attorneys for Respondent, Ironworkers Local 480, in the within matter. I have personal knowledge of all the allegations set forth in this affidavit. This affidavit is made in support of Local 480's motion for partial re-

lief from the terms of the Judgment-Order entered against it on May 11, 1979.

2. On April 21, 1982, an application for similar relief was filed on behalf of Local 480. This motion was denied without prejudice by Order of this Court dated May 13, 1982, in the following language:

> The motion by respondent for partial relief is denied without prejudidce to renew such motion after 90 days if the situation is not clarified by then; the present panel to retain jurisdiction.

A copy of this Order is attached hereto as Exhibit "A".

3. I have received no communication from the Board regarding the implementation of a backpay specification against Local 480 since the issuance of this Court's May 13, 1982 Order. Local 480 is, thus, renewing its motion for partial relief since the situation has not in any manner been "clarified" during the 90 day period following the entry of this Court's Order. Indeed, although the period since the Court order now extends approximately 150 days, Local 480 has not been apprised of any significant activity by the Board in attempting to implement the broad based backpay specification.

4. The Board submitted in opposition to our original motion affidavits of Edward J. Peterson, Compliance Supervisor, and Gregory M. Burke, a Board Field Examiner. These affidavits attempt to explain the reasons why the Board has been unable to implement the backpay provisions of this Court's Judgment Order issued May 11, 1979. The excuses are varied and wide ranging and include an allegation that the Board has been frustrated by Local

480 in its attempt to formulate a backpay specification. This assertion is factually incorrect as the following recital will disclose.

5. Our records disclose that the Board made only two visits to the Local 480 hiring hall during 1979, i.e., August 14, and November 6. A copy of our letter dated January 18, 1980, referring to these two dates, it attached hereto as Exhibit "B". In early 1980, Mr. John Mansfield, a Board field representative, visited the local's hiring hall on several occasions to review the local's referral registers. In February, Mr. Mansfield indicated that his inspection would be concluded "within one or possible two days." A copy of our letter dated February 12, 1980, confirming this statement is attached hereto as Exhibit "C". For some unexplained reason the Board failed to follow through on its representation to complete their review within the estimated two day time period.

6. In October, 1980, Local 480 acceded to the Board's request and allowed the xeroxing of those referral registers of which the Board did not already have a copy. To this date, however, approximately two years later, the local has still not been advised as to the identity of these individuals which the Board contends fall within the "similarly situated" category.

7. In October, 1981, I was invited by Mr. Burke to attend a conference to discuss possible methods of resolving the backpay problem. The meeting was called to attempt to resolve the impasse which had been reached in the Board's efforts to formulate a backpay specification. The possibility of a lump sum payment based upon the financial ability of the local to pay was discussed. The

Board advised that before it would be in a position to advance a settlement figure, it would require some information regarding the financial condition of the local. I subsequently advised Mr. Burke that the local's finances were fully set forth in its annual LM-2 reports filed with the Department of Labor. (A copy of the 1975 Report is attached hereto as Exhibit "D"). Although these reports fully set forth all of the financial data of the local, I further advised that the Board should contact me if additional information or clarification was required.

8. I received no communication from the Board until receipt of a letter dated January 19, 1982. (A copy is attached as Exhibit "E"). This letter inaccurately stated that "it was proposed that the Regional Office take all of the disposable assets of the local in settlement of the amount due . . ." Our lengthy response to this correspondence setting forth our position as to what occurred at the settlement conference is conntained in our letter to the Board dated January 27, 1982. (Copy attached as Exhibit "F"). We received no response from the Board to this letter. Subsequently, we filed our first motion for partial relief from judgment.

9. I am, therefore, submitting this affidavit in support of Local 480's re-application for partial relief from the terms of the Judgment-Order entered against it on May 11, 1979.

JOHN J. MULVIHILL

Sworn and subscribed to
before me this 29th day
of September, 1982.

KATHLEEN SPARROWE
Notary Public of New Jersey
My Commission Expires April 24, 1985